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FEDERAL ELECTION COMMISSION
999 E Street, N.W.
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FIRST GENERAL COUNSEL'S REPORT

SENSITIVE

MUR: 5815
DATE COMPLAINT FILED: 9/15/2006
DATE OF NOTIFICATION: 9/22/2006
DATE ACTIVATED: 11/07/2006

EXPIRATION OF SOL: JUNE 2011

COMPLAINANT:

The Republican Party of New Mexico

RESPONDENTS:

**Madrid for Congress and Rita Longino, in
her official capacity as Treasurer
Patricia Madrid
The State of New Mexico**

**RELEVANT STATUTES
AND REGULATIONS:**

2 U.S.C. § 441a(a)(1)(A)
2 U.D.C. § 441a(f)
2 U.S.C. § 434(b)
11 C.F.R. § 109.21

INTERNAL REPORTS CHECKED:

FEC Disclosure Reports

FEDERAL AGENCIES CHECKED:

None

I. INTRODUCTION

The complaint in this matter alleges that Patricia Madrid and her campaign committee, Madrid for Congress and Rita Longino, in her official capacity as Treasurer ("the Committee"), violated the Federal Election Campaign Act of 1971 (the "Act"), as amended by the Bipartisan Campaign Reform Act of 2002 ("BCRA"). Ms. Madrid was the Attorney General for the State of New Mexico in 2006.¹ Ms. Madrid was also a candidate for a seat in the United States House of Representatives for New Mexico's 1st

¹ Ms. Madrid was first elected Attorney General in 1998 and re-elected in 2002. Her last term in office ended in 2006.

1 Congressional District in 2006. The complaint alleges that four mailers distributed by
2 Ms. Madrid between June and August 2006 in her capacity as Attorney General of the
3 State of New Mexico (the "State") "are no less than self-promotional campaign flyers,
4 paid for by state government money, disguised as informational mailers." The complaint
5 argues that these mailers constitute coordinated campaign expenditures, and the
6 associated costs constitute excessive contributions by the State to Ms. Madrid's campaign
7 committee.²

8 In response to the complaint, Ms. Madrid and her campaign committee, and,
9 separately, the State, argue that the mailers: (1) serve a legitimate civic function and did
10 not further Ms. Madrid's congressional campaign; (2) address sexual exploitation of
11 minors over the Internet, the theft of personal information from veterans, the high cost of
12 prescription medications, and the dangers of methamphetamine laboratories; (3) provide
13 information on how the reader may receive free information directly from the State, or
14 supplies contact information for reporting illegal activity, and (4) do not reference an
15 election or solicit contributions, or contain express advocacy for or against any
16 candidate.³

² The complaint also alleges that, by using "payouts from lawsuits brought by the Attorney General's Office," Ms. Madrid violated a New Mexico law that prohibits public officials from using their office for personal gain. This Report does not address this allegation because it does not fall within the jurisdiction of the Commission.

³ Ms. Madrid and the Committee also argue that there is no legal basis for treating the Attorney General's official mailings differently from those made by a member of Congress running for re-election, and that the complaint should be dismissed because the "basis for [its] conclusion is unclear and inconsistent and no specific provision or section of the Act is cited," and, therefore, it does not meet the requirements for a valid complaint under the regulations. Neither of these arguments has merit. The communications at issue fall within the scope of the Act, as amended by BCRA; congressional newsletters do not because the Federal Government is specifically exempted from the definition of "person" and such communications are, therefore, not covered by the Act. With respect to the alleged deficiency of the complaint, we note that it contains facts that describe a violation of the Act, as explained below.

As discussed in more detail below, we conclude that one of the mailers at issue may have been coordinated with Ms. Madrid's campaign pursuant to 11 C.F.R. § 109.21, and, thus, constituted an excessive in-kind contribution from the State to the Committee. Therefore, we recommend that the Commission: (1) find reason to believe the State may have violated 2 U.S.C. § 441a(a)(1) by making an excessive contribution to Ms. Madrid's campaign committee; (2) find reason to believe the Committee may have violated 2 U.S.C. §§ 441a(f) and 434(b) by knowingly accepting the excessive contribution and failing to report it; (3) find reason to believe Ms. Madrid may have violated 2 U.S.C. § 441a(a)(1) by knowingly receiving excessive contributions; and (4) authorize the use of

II. FACTUAL AND LEGAL ANALYSIS

A. Factual Summary

The State of New Mexico acknowledged in its response to the complaint that the four mailers at issue were paid for with funds received by the State in connection with lawsuits Ms. Madrid brought as Attorney General, and were distributed to residents of the State of New Mexico between June and August 2006. All of the mailers at issue were distributed after the New Mexico primary election held on June 6, 2006, with the possible exception of the mailer entitled "Veterans;" the exact mailing date of "Veterans," which was mailed at some point in June 2006, is not known at this time. The mailers are summarized as follows:

1 1. **"Be Afraid"**

2 **"Be Afraid"** was mailed in July 2006 reportedly at a cost of \$100,011.⁴ On the
3 front of the mailer the words **"Be Afraid"** appear above a picture of a young girl on a
4 computer. *See Complaint, Exhibit B.* Beneath this image is a box with text inside
5 describing a "true story" of a girl who fell victim to an Internet predator. *Id.* On the
6 inside of the mailer written across the top are the words: "Online Predators are
7 Exploiting Our Children ... [and beneath and in smaller font] Attorney General Patricia
8 Madrid is taking action to keep New Mexico's children safe." *Id.* The mailer describes
9 actions being taken by Attorney General Patricia Madrid, states that Ms. Madrid needs
10 the readers' help to protect the children, and instructs the reader to download or request a
11 free copy of Ms. Madrid's Internet Safety Guide for Parents and Teens and provides
12 information regarding how to do so. *Id.* The back contains, among other things, a picture
13 of Ms. Madrid with a statement from her about protecting New Mexico's children and
14 teens. *Id.*

15 2. **"Veterans"**

16 **"Veterans"** was mailed in June 2006. The associated cost is not known at this
17 time. **"Veterans"** is a mailer regarding the theft of veterans' identities. *See Complaint,*
18 Exhibit D. Appearing across the top of the mailer are the words: "Attorney General
19 Patricia Madrid Has Taken Action to Protect Veterans." *Id.* A picture of Ms. Madrid
20 appears in the center of the mailer. *Id.* On the left side of the picture, the mailer

⁴ According to an article attached to the complaint entitled, "AG predator mailing riles Republicans," then Attorney General Madrid stated that "thousands were printed [and] mailed out statewide at a cost of \$100,011 using money her office won prosecuting companies that defrauded New Mexicans." *See Complaint, Exhibit H.* The article, which was posted on the news organization's website on July 12, 2006, indicates that **"Be Afraid"** was disseminated during the week of July 3-7, 2006. *Id.*

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describes steps individuals can take if they are victims of identity theft; to the right of the picture, the mailer states, among other things, that the Department of Veteran Affairs allowed the personal information of millions of veterans to be stolen. *Id.* At the bottom the reader is told to: "Get your free copy of New Mexico Attorney General Patricia Madrid's Identity Theft Repair Kit" and is provided information about how to do so. *Id.*

3. "Prescription Drugs"

"Prescription Drugs" was mailed in July 2006, and cost \$61,257 to produce.⁵ It is a mailer regarding the cost of prescription drugs. See Complaint, Exhibit E. The mailer states, "Attorney General Patricia Madrid Is Fighting to Keep Your Prescription Cost Down," provides information on a free Prescription Drug Pricing Guide, and offers the reader an order form for the updated guide. *Id.*

4. "Meth Lab"

"Meth Lab" was mailed in August 2006. The cost of this mailer is not available. "Meth Lab" contains a message from Attorney General Madrid and the President of the New Mexico Sheriff's and Police Association. See Exhibit G. The two law enforcement officials are pictured together on the front of the mailer, which alerts readers to the warning signs of a methamphetamine laboratory and provides telephone numbers to use to report a suspected lab. *Id.*

⁵ According to an article attached to the complaint entitled "More Mailers From AG's Office On The Way," the "Veterans" mailer cost \$61,257 to produce. See Complaint, Exhibit F.

B. Legal Analysis

The Act, as amended by BCRA, provides that no person shall make contributions to any candidate and his or her authorized political committee with respect to any election for federal office, which, in the aggregate, exceed \$2,100.⁶ 2 U.S.C. § 441a(a)(1)(A). Further, candidates and political committees are prohibited from knowingly accepting any contributions in excess of the Act's limitations. 2 U.S.C. § 441a(f).

Ms. Madrid and the Committee claim that the \$2,100 contribution limitation does not apply to the State of New Mexico because States are not a "person" as defined by the Act. See Response of Ms. Madrid and the Committee, p. 5, footnote 17. Under the Act, "person" is defined as "an individual, partnership, committee, association, corporation, labor organization, or any other organization or group of persons," but such term does not include the Federal Government or any authority of the Federal Government. 2 U.S.C. § 431(11). As to whether the Act applies to States, the "Commission has made clear that State governments and municipal corporations are persons under the Act and are subject to its contribution provisions." See Advisory Opinion 2000-05; *see also* Advisory Opinion 1999-7 (although the definition of "person" in the Act exempts the federal government, "the Commission has not extended this exclusion to State governments or their instrumentalities.").⁷ See 2 U.S.C. § 431(11).

⁶ The Bipartisan Campaign Reform Act of 2002 indexed certain contribution limits for inflation. For the 2005-2006 election cycle, the limit for individual contributions to Federal candidates, indexed for inflation, was \$2,100.

⁷ The Commission has applied the Act to States in several enforcement matters. See, e.g., MUR 1686 (Jim Hunt Committee) (Commission found RTB that the State of North Carolina violated 2 U.S.C. § 441a(a)(1)(A) with respect to making an excessive in-kind contribution); and MUR 3986 (Wilder for President Committee) (Commission found reason to believe that the Commonwealth of Virginia violated the Act by making excessive in-kind contributions).

1 At issue is whether the mailings disseminated by Ms. Madrid in her capacity as
2 Attorney General of the State of New Mexico were coordinated with Ms. Madrid or her
3 campaign committee. If so, the costs of the mailers would be in-kind contributions from
4 the State of New Mexico to the Committee that, given the cost information available at
5 this time and the wide dissemination of the mailers, would likely exceed the contribution
6 limitations at 2 U.S.C. § 441a(s)(1)(A).

7 A straightforward application of the coordination regulations at 11 C.F.R.
8 § 109.21 suggests that the State of New Mexico made an in-kind contribution to the
9 Committee in the form of a coordinated expenditure with respect to the mailer entitled
10 "Meth Lab." The payment prong of the coordination regulation, 11 C.F.R.
11 § 109.21(a)(1), is satisfied because the mailer was paid for by the State of New Mexico,
12 that is, a person other than a candidate, the candidate's committee, a political party
13 committee, or any of their agents. The content prong, 11 C.F.R. § 109.21(c), may have
14 been satisfied because "Meth Lab" was a mass mailing, and therefore, a public
15 communication, and the mailer contains a clearly identified federal candidate's (Ms.
16 Madrid's) name and photograph, and may have been directed to New Mexico voters
17 within 90 days of the November 7, 2006 General Election.⁸ Finally, there is a basis to

⁸ Current Section 109.21(c) of the Commission's regulations became effective on July 10, 2006. The regulation implements a decision of the Court of Appeals in *Shays v. FEC*, in which the court affirmed the District Court's invalidation of the fourth content standard of coordinated communications regulations the Commission promulgated in 2002. See *Shays v. FEC*, No. 04-5352 (D.C. Cir. July 15, 2005). The 2002 regulation, which remained in effect pending the Commission's promulgation of the new regulation, is satisfied if a public communication is, *inter alia*, publicly distributed or disseminated "120 days or fewer" before a primary or general election. Technically, the 2002 regulation governs two of the mailers at issue -- "Veterans," and "Be Afraid," which appear to have been distributed prior to the July 10, 2006 effective date of the new regulation; however, given the Commission's conclusion during the 2006 rulemaking that a 90-day window is more appropriate for determining whether a communication involving a Congressional candidate is made for the purpose of influencing Federal elections, we have applied the fourth content standard, as revised in 2006, to all of the mailers at issue in this case. The mailer entitled "Veterans," which was distributed in June 2006, "Be Afraid," which was distributed in July 2006, and

1 investigate whether the conduct prong has been met because there is no dispute that the
2 Attorney General's Office, of which Ms. Madrid was the top official, disseminated the
3 mailer. As the top official, Ms. Madrid may have requested or suggested that the
4 communication be created, produced or distributed, or may have been materially
5 involved in decisions regarding, or had substantial discussions about, pertinent aspects of
6 the communication.⁹

7 Thus, with respect to the mailer entitled "Meth Lab," the State of New Mexico
8 may have made, and the Committee may have knowingly accepted, an in-kind
9 contribution in the form of a coordinated communication. See 11 C.F.R. § 109.21(b)(2).
10 Consequently, the cost of this mailer appears to constitute an in-kind contribution from
11 the State to Ms. Madrid's campaign committee. We do not have information at this time
12 regarding the cost of producing and disseminating the "Meth Lab" mailer; however, the
13 mailer was disseminated throughout the State, the cost of which, alone, would likely have
14 exceeded the \$2,100 contribution limit.

15 Based on the foregoing, we recommend that the Commission find reason to
16 believe that the State of New Mexico may have violated 2 U.S.C. § 441a(a)(1) by making
17 an excessive in-kind contribution to Ms. Madrid's campaign committee in the form of a
18 coordinated expenditure, and Madrid for Congress and Rita Longino, in her official

"Prescription Drugs," also distributed in July 2006, all fall outside of the 90-window. Thus, only one of the four mailers at issue, "Meth Lab," appears to satisfy the content prong.

⁹ Cf. Advisory Opinion 1999-11 (Dianne Byrum) (concluding that the costs of billboards located in the legislative district of a federal candidate's state office, used to advertise "weekly coffees" with her constituents, would not result in contributions or expenditures provided the communications did not expressly advocate the election of the candidate or the defeat of his or her opponents and did not solicit contributions); MUR 4099 (Orloski) (finding no contribution resulting from a congressman's speech at a senior citizens picnic hosted by three corporations); see also *Orloski v. FEC*, 795 F.2d 156 (D.C. Cir. 1986). These are pre-BCRA determinations and before the promulgation of the coordination regulations at Section 109.21.

1 capacity as Treasurer, may have violated 2 U.S.C. §§ 441a(f) and 434(b) by knowingly
2 accepting the excessive contribution and failing to report it. In addition, Ms. Madrid may
3 have had a direct role in making the excessive contribution because the Attorney
4 General's Office of the State of New Mexico, of which she was the top official,
5 disseminated the mailers. Therefore, we also recommend that the Commission find
6 reason to believe that Ms. Madrid, as a Federal candidate, may have knowingly received
7 funds in connection with her candidacy that exceeded the applicable contribution
8 limitation in the Act, in violation of 2 U.S.C. § 441a(a)(1).¹⁰

9 **III. INVESTIGATION**

10 This Office seeks authorization to issue appropriate interrogatories, document
11 subpoenas, and deposition subpoenas to conduct a limited investigation in this matter.
12 Generally, this Office will seek to confirm that the conduct prong of the coordinated
13 communications regulations has been met in this matter, and ascertain the cost of
14 producing and disseminating the "Meth Lab" mailer.

15 **IV. RECOMMENDATIONS**

- 16 1. Find reason to believe that the State of New Mexico violated 2 U.S.C.
17 § 441a(a)(1).
18
19 2. Find reason to believe that Madrid for Congress and Rita Longini, in her
20 official capacity as Treasurer, violated 2 U.S.C. §§ 441a(f) and 434(b).
21

¹⁰ We note that the amount in violation in this matter is probably substantially greater than the relatively small amount in violation in MUR 5770, a case that also involved a communication made by a federal candidate to his or her constituents, that the Commission dismissed on May 30, 2007, in an exercise of prosecutorial discretion. See *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). In MUR 5770, the amount spent on the constituent communication was only \$3,366. Here, while we do not know exactly how much was spent on the mailer at issue, the amount in violation would probably have been substantial based on the following facts: the mailer was disseminated throughout the State of New Mexico; a similar 4-page brochure cited in the complaint reportedly cost over \$100,000.

1 3. Find reason to believe that Patricia Madrid violated 2 U.S.C. § 441a(a)(1).
2

3 4. Approve the attached Factual and Legal Analyses.
4


5 5. Authorize the use of compulsory process, including the issuance of appropriate
6 interrogatories, document subpoenas, and deposition subpoenas, as necessary.
7


8 6. Approve the appropriate letters.
9

10 Thomasenia P. Duncan
11 Acting General Counsel
12

13 7/10/07
14 Date

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